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Nos. 95-779 and 95-259

In the Supreme Court of the United States

October Term, 1995

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., and LEONARD D. BIEBER, *Respondents*.

DARLENE WALTERS, *Petitioner*,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., and LEONARD D. BIEBER, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

Per Petitioner Equal Employment Opportunity Commission:

The Prohibition against employment discrimination set forth in Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e(b), applies to an employer "engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." The question presented is:

Whether an hourly paid employee who has an ongoing employment relationship with a person, as reflected by the employee's inclusion on the person's payroll, is counted as an employee of that person for purposes of Section 2000e(b) on days when the employee is not at work or on paid leave.

Per Petitioner Darlene Walters:

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* (1988 & Supp. V. 1993), applies only to an "employer," defined in Section 701(b), 42 U.S.C. § 2000e(b), (1988), to be "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."

The question presented is:

Whether that jurisdictional definition is satisfied when an employer maintains fifteen or more employees on the payroll for the requisite number of weeks even though fewer than fifteen employees report to work or are on paid leave on each day of each such week, as to which the courts of appeals are in direct conflict.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 6

ARGUMENT 9

I. EEOC'S GUIDELINE IS NOT ENTITLED TO GREAT DEFERENCE 9

A. This Court Should Construe the Term "Employer" Independent of Agency Interpretation 9

B. EEOC's Guideline Is Entitled Only to Consideration 12

C. The Validity of EEOC's Reasoning 14

1. EEOC's Attribution to Congress of an Intent to Define "Employer" in Terms of an Employer-Employee Relationship is Unsubstantiated 14

2. EEOC's Official Interpretation Does Not Attribute any Meaning to the Statute's Phrase "for Each Working Day" 16

Page

D. EEOC Has Not Thoroughly Considered Legislative Intent in Reaching Its Interpretation 18

II. THE PROPER INTERPRETATION OF "EMPLOYER" UNDER TITLE VII 21

A. Rules of Statutory Construction Support a "Plain Language" Interpretation 21

B. "Each Working Day" Should Refer to Compensation or to Physical Presence . 24

III. CONGRESSIONAL POLICY FAVORS A BROAD EXEMPTION FOR SMALL BUSINESSES 25

CONCLUSION 29

TABLE OF AUTHORITIES CITED

Page

CASES

Addison v. Holly Hill Fruit Products, 322 U.S. 607 (1944) 7,10

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 3,11-13

Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 21

Equal Employment Opportunity Commission v. Metropolitan Educational Enterprises, Inc., 60 F. 3d 1225 (7th Cir. 1995) 5-6,12,17,20,22

Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27 (1981) 11

Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726 (1973) 10-11

General Electric Company v. Gilbert, 429 U.S. 125 (1976) 12-13

Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616 (1987) 2

Keene Corp.v. United States, 508 U.S.___, 113 S. Ct. 2035 (1993) 22

Martin v. Wilkes, 490 U.S. 755 (1989) 2

Page

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 7,13,18

Social Security Board v. Nierotko, 327 U.S. 358 (1946) 11

Thurber v. Jack Reilly's, 717 F.2d 633 (1st Cir. 1983) 16-17,23

United States v. Menasche, 348 U.S. 528 (1955) 23

United Steelworkers of America AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979) 2

Vera-Lozano v. International Broadcasting, 50 F.3d 67 (1st Cir. 1995) 16

Young v. Gerhard v. Sprinkle Masonry, Inc., 856 F. Supp. 300 (E.D. Va. 1994) 22-23

Zimmerman v. North American Signal Co., 704 F.2d 347 (7th Cir. 1983) 5-6,22-23,25

RULES

Rule 37.3 3

STATUTES

15 U.S.C. § 631 27

§ 631(a) 28

§ 631a(a) 27

Page

§ 2508 26

21 U.S.C. § 343 26

22 U.S.C. § 2352 26

26 U.S.C. § 44 20-21,26

38 U.S.C. § 3742 26

42 U.S.C. § 1981a(b)(3) 22

42 U.S.C. § 2000e 6,9

§ 2000e(b) 5-7,9-10,14,20-21,25-26,28

2000e-3(a) 4

MISCELLANEOUS

Civil Rights Act of 1964,
Pub. L. No. 88-352, § 107(b) Stat. 253-54 . . . . . passim

J. Sutherland, Statutory Construction, § 46.06 (1992) . . 23-24

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has nearly 25,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned

citizens, many of whom are lawyers. PLF's Board of Trustees evaluates the merits of any contemplated action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

PLF has previously participated in cases concerning Title VII. For example, PLF participated as amicus curiae before this Court in *United Steelworkers of America AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979); *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616 (1987), and *Martin v. Wilks*, 490 U.S. 755 (1989). Amicus PLF seeks to augment the argument in the respondents' brief. PLF believes that its public policy perspective and litigation experience dealing with Title VII will provide an additional viewpoint with respect to the legal issues presented.

The National Federation of Independent Business (NFIB) is the nation's largest advocacy organization representing small and independent businesses. With an audited membership of more than 600,000 business owners, NFIB is a melting pot of commercial enterprise, high-tech manufacturers, family farmers, neighborhood retailers, and service companies. Founded a half century ago in 1943, NFIB was created to give small and independent business a voice in governmental decision making. Today, the organization remains true to its charter of advancing the concerns of small business owners among state and federal legislators and regulators.

In joining as amicus on this brief, NFIB does not mean to suggest that Congress' definition of "employer" in Title VII of the Civil Rights Act of 1964 is an adequate or appropriate statutory method of determining which small businesses are exempt from the jurisdiction of this Act. NFIB believes that Congress would do well to amend this

statute to define "employer" in a way that better reflects the modern workplace, as long as the general policy of protecting small businesses from excessive regulatory burdens and fostering their economic interests is kept intact. In the past the NFIB has supported legislation which defined businesses exempt from federal regulatory statutes based on the number of hours worked. We believe that this is a much more practical statutory approach for providing that seasonal and part-time employees are not counted towards an exemption threshold. Until Congress does amend this statute, however, NFIB believes that EEOC must comply with the plain meaning of the statute as advocated herein. EEOC's current interpretation is ultra vires and invalid under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and violates a clear congressional intent to exclude seasonal and part-time employees from those counted to reach the threshold of fifteen. If EEOC's definition is allowed to stand, thousands of small employers who have considered themselves safe from the burdensome regulatory reach of government will no longer have that safety. In addition, as the Court is aware, small business exemptions currently drafted in the Age Discrimination in Employment Act and the Americans with Disabilities Act would also likely be weakened. In many major federal regulatory statutes, Congress has seen fit to exempt small businesses from excessive regulatory burdens. In its disregard of the plain language of Title VII, EEOC has undermined this intent. If EEOC's violation of its delegated authority is not checked, it is likely that other agencies will follow suit, and laws designed to protect small business will continue to be eroded.

Pursuant to Rule 37.3, written permission from all parties to file this brief has been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

Petitioner Darlene Walters was an employee of respondent Metropolitan Educational Enterprises, Inc. (MEE), from 1986 to 1990. *Brief for the Equal Employment Opportunity Commission* at 3 (*EEOC Brief*). Ms. Walters voluntarily resigned from her position with MEE on April 10, 1990. *Respondent's Brief in Opposition to Petition for Writ of Certiorari* at 2 (*Resp. Brief in Opp.*). On April 12, 1990, she filed a charge of gender discrimination with petitioner Equal Employment Opportunity Commission (EEOC) against MEE, based upon MEE's denial of her application for a promotion eight months previously. *Id.* The EEOC subsequently concluded that, because the individual hired for the job in question was better qualified for the position than Ms. Walters, the evidence did not establish a violation of Title VII. *Id.* at 3.

On April 13, 1990, Ms. Walters asked to be rehired by MEE. *Id.* MEE agreed, but subsequently discharged her on April 23, 1990, for unsatisfactory job performance upon discovering that she was seeking employment with one of MEE's business competitors. *Id.* Ms. Walters then filed a second charge against MEE with the EEOC, claiming that she was discharged in retaliation for her original gender discrimination charge. *Id.*

Thereafter, in 1993, the EEOC filed a lawsuit in federal District Court against MEE and its President, Leonard Bieber, for violating Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), which prohibits retaliatory discharges. *EEOC Brief* at 4. Ms. Walters intervened in that lawsuit, bringing additional claims under Title VII and under state law. *Id.* Respondents MEE and Bieber moved to dismiss the suit, claiming the District Court lacked subject matter jurisdiction because MEE was not an "employer" for purposes of

Title VII. *Id.* Title VII defines "employer," in relevant part, as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year ...." 42 U.S.C. § 2000e(b).

The District Court granted the respondents' motion, and the United States Court of Appeals for the Seventh Circuit affirmed on appeal. *Equal Employment Opportunity Commission v. Metropolitan Educational Enterprises, Inc.*, 60 F.3d 1225 (7th Cir. 1995). The sole issue in dispute was the meaning of the phrase "fifteen or more employees for each working day in each of twenty or more calendar weeks." The Seventh Circuit followed its own precedent from *Zimmerman v. North American Signal Co.*, 704 F.2d 347, 352 (7th Cir. 1983), a case which construed the similarly worded definition of "employer" from the Age Discrimination in Employment Act (ADEA). *Metropolitan*, 60 F.3d at 1227. In *Zimmerman*, the Seventh Circuit held that, in order to give meaning to the phrase "for each working day," the court would count all salaried employees toward the jurisdictional minimum, but only count hourly or part-time workers as employees on days on which they were physically present or on paid leave. If the jurisdictional minimum were present on each day of a work week, that week could count toward one of the twenty required. *Id.* at 1227. In applying the *Zimmerman* test to MEE, both the District Court and the Court of Appeals found that MEE was not an employer for purposes of Title VII, and therefore the federal court lacked jurisdiction. *Id.* at 1230.

EEOC and Ms. Walters claimed that the *Zimmerman* approach was flawed, and asked the Seventh Circuit to reconsider its interpretation of the statute. *Id.* at 1227. They contended that the court should employ the "payroll method" instead. *Id.* at 1228-29. Under that method, which is

employed by the EEOC under its guideline, *id.* at 1229, a court simply looks to the number of employees maintained on the employer's payroll in a given week. *Id.* at 1227. If the jurisdictional minimum is met for that week, then the week is counted toward one of the twenty calendar weeks. *Id.*

The Seventh Circuit was unpersuaded by the arguments of petitioners. *Id.* at 1230. It rejected the payroll method as ignoring the "plain text" of the phrase "for each working day," *id.* at 1228, and further found the petitioners' legislative history and public policy arguments unavailing in light of the Seventh Circuit's "settled statutory interpretation." *Id.* at 1229-30.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate in its employment practices on the basis of race, color, religion, gender, or national origin. 42 U.S.C. § 2000e, *et seq.* In Section 2000e(b), Congress defined the term employer to mean: "[A] person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." EEOC, the agency responsible for administering Title VII of the Civil Rights Act of 1964, has interpreted Section 2000e(b) by utilizing the "payroll method." That method simply looks at the number of employees on a payroll for a given week. If at least fifteen employees appear on that payroll, that week is counted toward the jurisdictional minimum. The Seventh Circuit has adopted a different method, designated the *Zimmerman* method. Under *Zimmerman*, the Seventh Circuit first counts all salaried employees toward the minimum. Then, as to all

other employees, it requires that EEOC look at each working day in a given week. If at least a total of fifteen employees are either salaried, at work, or on compensated leave for each working day in a given week, that week may be counted toward the jurisdictional minimum.

Because Section 2000e(b) goes to the jurisdiction of EEOC, this Court should not defer to EEOC's interpretation of that statute. A regulatory agency has no authority to determine the scope of its own jurisdiction; rather, its jurisdiction is determined by Congress' intent. *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 616 (1944). Instead, EEOC's interpretation may be entitled to consideration, depending upon the consistency of its application, the validity of its reasoning, and the thoroughness evident in its consideration. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

The validity of EEOC's reasoning is flawed. It does not offer an adequate explanation for failing to give import to the statutory language "for each working day." EEOC argues that, in an ongoing employer-employee relationship, an employer "has" an employee every day even if an employee does not work "for each working day," and that therefore that phrase is insignificant. This interpretation is undermined both by the fact that Congress never evidenced any intent to focus on the relationship between employer and employee in its statute, and by the fact that EEOC counts employees toward the jurisdictional minimum even in the absence of any such relationship.

EEOC also failed to consider thoroughly legislative history in arriving at its interpretation. While EEOC points out that a motivating factor behind the statute's modification was the concern of its sponsors respecting seasonal and agricultural employers, that history does not shed light on the

question of what Congress intended by inclusion of the phrase "for each working day." Contrary to EEOC's version, the legislative history relevant to the specific language in dispute, "for each working day," is sparse. The legislative history indicates that Congress intended to expand the exemptions for small businesses, rather than limit them, when it defined the term "employer" by setting a jurisdictional minimum number of employees.

Interpreting the statute according to established principles of statutory construction requires that significance be attributed to the phrase "for each working day." A proper construction requires that EEOC look at each working day and establish that an employer have at least fifteen employees present or compensated on each day of a week in order for that week to count toward the jurisdictional minimum.

Congress clearly intended to exempt small businesses from the reach of Title VII by defining the word "employer" in terms of size. Congress has consistently expressed a policy of giving small businesses the widest degree of freedom in which to manage themselves, without being saddled with the cost of federal regulatory burdens which inhibit their ability to operate or survive.

Any limitation on EEOC's jurisdiction determined by interpretation of this statute is a consequence that comports with congressional policy. Curbing the reach of EEOC will not, as EEOC presumes, necessarily result in a corresponding increase of offensive employment practices, only in the ability of EEOC, a federal agency, to exercise jurisdiction over small businesses. Moreover, the possibility of negative consequences flowing from a rejection of EEOC's interpretation is insufficient to establish EEOC's jurisdiction in the absence of a congressional intent to confer such jurisdiction.

ARGUMENT

I

EEOC'S GUIDELINE IS NOT ENTITLED TO GREAT DEFERENCE

A. This Court Should Construe the Term "Employer" Independent of Agency Interpretation

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate in its employment practices on the basis of race, color, religion, gender, or national origin. 42 U.S.C. § 2000e, *et seq.* In Section 2000e(b), Congress defined the term employer to mean: "[A] person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."

This Court must determine what Congress intended by its definition of the term "employer." To arrive at that determination, EEOC has argued strenuously that, as the agency officially charged with administering Title VII, this Court should defer to its interpretation of Section 2000e(b).[1]

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[1] EEOC has promulgated an interpretation of "employer" based upon 42 U.S.C. § 2000e(b). EEOC Policy Guidance N-915-052 (guideline) (cited by reference to Petitioner EEOC's Appendix D at 30a-40a (Pet. App.)). EEOC's guideline provides that all employees who appear on the payroll for a given week are counted, regardless of whether they are present for every working day of that week. Pet. App. at 40a.

However, because the interpretation in question goes directly to the issue of the authority delegated by Congress to EEOC, principles of administrative law demonstrate that EEOC's interpretation is not entitled to deference by this Court. As stated in *Addison*, 322 U.S. at 616, "[t]he determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."

Congress went to considerable lengths in crafting the definition of the term "employer" for purposes of Title VII. It established parameters as to number of employees, days worked, and weeks worked, within the fixed time frame of two calendar years, 42 U.S.C. § 2000e(b); it also included a detailed phase-in period. Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 253-54. As pointed out in *Addison*, "[t]he wider a delegation is made by Congress to an administrative agency the more incomplete is a statute and the ampler the scope for filling in, as it is called, its details. But when Congress wants to give wide discretion it uses broad language." *Addison*, 322 U.S. at 616. Here, the specificity with which Congress limited the reach of Title VII hardly amounts to a broad delegation of discretion to EEOC to determine who falls within Title VII's proscriptions. EEOC's request for deference to its interpretive guideline amounts to a request that EEOC be allowed to decide for itself the scope of its statutory jurisdiction.

This Court has previously had occasion to consider similar questions of deference to administrative agency determinations of jurisdiction. In *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973), this Court rejected the Federal Maritime Commission's interpretation of its legislative authority. Said the Court:

> But the Commission contends that since it is charged with administration of the statutory scheme, its construction of the statute over an extended period should be given great weight. [Citation omitted.] This proposition may, as a general matter, be conceded, although it must be tempered with the caveat that *an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate.*

Id. at 745 (emphasis added). This Court has further stated that: "[a]n agency may not finally decide the limit of its statutory power. That is a judicial function." *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946). *See, also, Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981) ("[C]ourts are the final authorities on issues of statutory construction. They must reject administrative constructions of the statute ... that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."); and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). An administrative agency's authority is entirely a product of the legislation which created it. *Nierotko*, 327 U.S. at 369. Because the statute at issue in this case goes directly to the scope of authority delegated to EEOC, it is incumbent upon this Court to determine independently whether EEOC's exercise of jurisdiction over defendant MEE was consistent with the statute enacted by Congress.

B. EEOC's Guideline Is Entitled Only to Consideration

In arriving at a proper interpretation of the term "employer," the measure of deference due EEOC's interpretation is relatively low.[2] This Court has previously addressed EEOC guidelines in *General Electric Company v. Gilbert*, 429 U.S. 125 (1976). In that case, as in this, EEOC argued that its guidelines were entitled to "great deference." *General Electric*, 429 U.S. at 140 (citation omitted). In rejecting EEOC's guideline, the Court refused to defer to the EEOC guidelines:

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[2] Both the court below and the EEOC cited *Chevron* for the principle that deference is due legitimate agency interpretations, *Metropolitan*, 60 F.3d at 1229-30, *EEOC Brief* at 39. However, it is clear from an examination of this Court's precedents that the degree of deference shown by this Court to the Environmental Protection Agency (EPA) regulation addressed in *Chevron* does not apply to EEOC's guideline. *Chevron* dealt with a valid EPA regulation, in which Congress made an "express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. 843-44. As stated above and conceded by EEOC, EEOC has no substantive rule-making authority. *EEOC Brief* at 35. In addition, Congress neither explicitly nor implicitly delegated authority to EEOC to interpret the term "employer"; rather, Congress chose to strictly limit EEOC's authority by defining the term itself in very specific language. Unlike in *Chevron*, the respondent is not challenging "the *wisdom* of the agency's policy," a challenge which the Court held must fail, *Chevron*, 467 U.S. at 866 (emphasis added); rather, respondent is challenging the agency's *authority* under the delegation made by Congress.

> [I]t should first be noted that Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title. [Citation omitted.] This does not mean that EEOC guidelines are not *entitled to consideration in determining legislative intent* [citation omitted]. But it does mean that courts properly may accord less weight to such guidelines than administrative regulations ....

General Electric, 429 U.S. at 141 (emphasis added). *General Electric* acknowledged that not all administrative agency actions were entitled to identical treatment by the courts; rather, the degree of deference to which agency actions are entitled depends upon the authority that Congress delegates to that agency.

General Electric announced that EEOC guidelines are entitled only to *consideration* under the standards announced in *Skidmore*. *Skidmore* held that agency interpretations "constituted a body of experience and informed judgment to which courts ... may properly resort for *guidance*." *Skidmore*, 323 U.S. at 140 (emphasis added). *Skidmore* listed several elements which would help a court to evaluate the persuasive weight which should be accorded an agency's interpretation: the thoroughness evident in its consideration; the validity of its reasoning; and its consistency with earlier and later pronouncements. *Id*. Any deference owing to EEOC's guideline must be evaluated under the standard announced in *Skidmore*. EEOC's guideline is not entitled to deference as "'a reasonable policy choice for the agency to make.'" *EEOC Brief* at 39 (citing *Chevron*, 467 U.S. at 845).

Under the *Skidmore* standard, EEOC's guideline fails to merit much weight. While it is true that EEOC has

consistently given a very liberal interpretation to the term "employer" in construing its own jurisdiction, as demonstrated by the analysis below, there are flaws in EEOC's reasoning and thoroughness in arriving at its interpretation of Section 2000e(b).

C. The Validity of EEOC's Reasoning

1. EEOC's Attribution to Congress of an Intent to Define "Employer" in Terms of an Employer-Employee Relationship Is Unsubstantiated

The question as to whether EEOC's interpretation is correct depends upon a finding that EEOC's official construction of Section 2000e(b) comports with Congress' intent in creating its very specific definition of the term "employer." EEOC's guideline is quite succinct in explaining Section 2000e(b). It clearly states that "[t]he Commission's position is that all part-time employees are counted whether they work part of each day or part of each week, as long as they are on the payroll." Pet. App. 34a. This is consistent with the EEOC's assumption that appearance on the payroll evidences an ongoing "employer-employee relationship."

The concept that Congress bore any concern whatsoever about an "ongoing employer-employee relationship" is one manufactured out of whole cloth by EEOC. There is no support in the statutory text or the legislative history that Congress intended its definition to cover the employer-employee relationship. As EEOC points out, Senator Dirksen explained that "the 'definition of "employer" [was] amended to provide a *specific test for computing the number of employees of an employer*, in determining whether the employer is covered by the bill.'" *EEOC Brief* at 28 (citing

110 Cong. Rec. 12,818 (1964) (emphasis added)). In other words, Congress opted for a mathematical formula. Had it intended to emphasize the existence of a relationship rather than simply provide a plain number equation, Congress could have done so.

In support of its argument that the nature of the relationship is relevant to the statutory interpretation inquiry, EEOC places great emphasis on the definition of the term "has." EEOC claims that "having" an employee evidences Congress' preoccupation with the notion of an ongoing "employer-employee relationship," and thereby justifies denying the phrase "for each working day" any special meaning because, presumably, an employer "has" an employee even on days on which that employee is not working. As noted above, Congress never expressed that the existence of a relationship was the focus of its concern. But even assuming that it is a relevant inquiry, EEOC's guideline demonstrates that the EEOC will count an individual as an employee whether or not that individual has an ongoing relationship with an employer. The guideline states that a person who "fills in" for an employee taking a day off is counted as an employee for the week in which that person appears on the payroll. Pet. App. 34a n.4. In other words, an individual who works one day, perhaps out of an entire year, will be counted by the EEOC as an employee "for each working day" of the week in which he or she showed up for work.

For EEOC's argument to remain consistent with the concept that the employer-employee relationship must exist "for each working day," EEOC should count an individual only if *that particular individual* has an ongoing employer-employee relationship, a position which EEOC has not adopted in its guideline. Ironically, EEOC indicates that the payroll method interpretation adopted by the First Circuit in

Thurber v. Jack Reilly's, 717 F.2d 633 (1st Cir. 1983), and reaffirmed in *Vera-Lozano v. International Broadcasting*, 50 F.3d 67 (1st Cir. 1995), is correct--but both of those cases indicated that part-time employees were counted under the payroll method only if an individual had "an ongoing employment relationship with the employer during the requisite twenty weeks." *Vera-Lozano*, 50 F.3d at 69. As noted above, EEOC expressly rejects that interpretation by stating that "a person 'filling in' for a regular employee should be counted as an employee during any week that (s)he is actually on the payroll." Pet. App. at 34a n.4. In taking that position, EEOC adopts an interpretation which *Thurber* specifically rejected. In *Thurber*, the First Circuit approved the exclusion of a part-time employee from the jurisdictional count--in the very case which EEOC's guideline rejects--because, in that case, the employee was only "occasional help, hired only to fill in for isolated vacation days of the regular employees." *Thurber*, 171 F.2d at 634. Clearly, the concept of an employment relationship is simply irrelevant to the jurisdictional inquiry.

2. EEOC's Official Interpretation Does Not Attribute any Meaning to the Statute's Phrase "for Each Working Day"

EEOC's guideline interpretation entirely ignores the phrase "for each working day." While EEOC has crafted several arguments as to how it gives meaning to that phrase, none bear up under scrutiny.

One argument for explaining how EEOC's interpretation gives meaning to the phrase "for each working day" is that, "'[b]ecause workers might join or leave a firm midweek, the clause ... meaningfully modif[ies] the language that follows: "in each of twenty or more calendar weeks."'" *EEOC Brief* at 22 (citation omitted). The problems with this argument

are manifold. First, as the Seventh Circuit pointed out in its decision below, the occasions on which an employee begins or ends employment midweek "are unlikely to occur with sufficient frequency to merit inclusion in a federal anti-discrimination statute." *Metropolitan*, 60 F.3d at 1228. EEOC offers no explanation as to how excluding such weeks from the jurisdictional count serves any purpose related to Title VII or its jurisdictional exemption provision. Second, the argument does not stand up well under a textual analysis: the phrase "for each working day" adds little to the subsequent phrase to demonstrate that midweek starts and terminations are implicated by that phrase. Third, and most significantly, EEOC's guideline counts "all regular part-time employees ... whether they work part of each day or part of each week," Pet. App. at 40a, indicating that, because the guideline expressly states that it looks only at the payroll *week*, employees are counted by EEOC *regardless of when they began or ended employment*. Consequently, the argument put forth by EEOC regarding new and terminated employees is not only nowhere evidenced in its guideline, the guideline plainly *rejects* rather than supports EEOC's newly minted argument.

The greatest inconsistency in EEOC's position is its claim that it "counts the number of salaried and hourly paid employees on the employer's payroll for that *day*," *EEOC Brief* at 14, in order to support its claim that it has in fact given significance to the phrase "for each working day." Nowhere does the EEOC guideline indicate that it looks at payroll *days* at all. On the contrary, it cites with favor the First Circuit's decision in *Thurber* and other cases that "the proper standard in determining whether an employer has the requisite number of employees is to count the number of employees maintained on the payroll in a given *week*." Pet. App. at 32a (emphasis added). EEOC further justifies its avoidance of the phrase "for each working day" by resort

to the statutory construction principle that the "literal interpretation of the words of an act should not prevail if it creates a result contrary to the apparent intention of the legislation." *Id.* at 36a (citation omitted). Given that the thrust of EEOC's guideline is to explain why EEOC is entitled to ignore the phrase "for each working day" in the statute, it is ironic that EEOC has offered a contrary position in this case by proposing new and novel explanations of how it has in fact *not* ignored the phrase "for each working day" in its guideline.

The inconsistencies between the justifications offered in EEOC's guideline for ignoring the phrase "for each working day" as compared to the justifications offered in its present argument amply illustrate flaws in EEOC's reasoning. EEOC has simultaneously taken the position that the phrase "for each working day" is a superfluity, *EEOC Brief* at 23 n.15, and that its official interpretation amply accounts for that phrase. *EEOC Brief* at 22. Because EEOC's explanation of its own interpretation of the statute is not supported by valid reasoning, under the *Skidmore* standard, EEOC's interpretation should not be given significant persuasive weight.

D. EEOC Has Not Thoroughly Considered Legislative Intent in Reaching Its Interpretation

Contrary to EEOC's claims, the legislative history of Section 2000e(b) cited by EEOC supports the interpretation that Congress intended to *exclude* from Title VII coverage employers who had less than fifteen employees at work or compensated on each working day in a given week.

The original bill which became the Civil Rights Act of 1964 defined "employer" as "a person engaged in an industry affecting commerce who has twenty-five or more employees,

and any agent of such a person." *EEOC Brief* at 23-24 (citation omitted). This bill was criticized by various Congressmen because it "would permit government to object to hiring practices by a store that 'employed as many as 25 persons full or part time." *Id.* at 24 (citation omitted). In its original form, the statute was understood by members of the legislature to include part-time employees.

The relevant portion of the "employer" definition was subsequently modified in two ways. Congress added the phrase "for each working day" *and* the phrase "in each of twenty or more calendar weeks in the current or preceding calendar year." One basis for the modification was that the sponsors of the bill were motivated by their concern for employers of seasonal and agricultural workers. *Id.* at 26 (citation omitted). The sponsors believed that the actual size of such businesses did not justify applying Title VII to them, despite the fact that they hired significant numbers of employees for a short period of time during the year. *Id.* at 27-28 (citations omitted).

EEOC argues that, because a concern for seasonal workers prompted modification, the language of the statute should be interpreted consistent with insuring that employers of seasonal workers be exempted, but no more. However, that argument has two failings: first, the legislative history relevant to seasonal employers is not specifically relevant to the question of nonseasonal employers; and second, the concern about employers of seasonal workers would have been adequately resolved by the simple insertion of the phrase "in each of twenty or more calendar weeks in the current or preceding calendar year." It did not require the addition of the phrase "for each working day."

In short, there is nothing in the legislative history of Title VII to demonstrate that application of the phrase "for

each working day" was limited only to the context of seasonal or agricultural employers. Indeed, "the legislative history of Title VII is too confused and chaotic to be of much use," *Metropolitan*, 60 F.3d at 1227 n.3., in construing Congress' intent with respect to the treatment of nonfull-time employees. The only legislative history that may be relevant to such employees specifically are *criticisms* which were leveled at the original definition *because it included part-time employees* in the jurisdictional count. *EEOC Brief* at 24 (citations omitted). It is reasonable to conclude from the legislative history that the modification of adding the phrase "for each working day" was intended to redress those criticisms, and that the modification of adding the "twenty or more calendar weeks" language was intended to redress the concerns as to seasonal employers.

In sum, the legislative history of Section 2000e(b) offers little support for EEOC's interpretation of "employer" as counting employees toward the jurisdictional minimum who do not work on "each working day."[3] Rather than providing

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[3] EEOC also argues that Senator Dirksen, a sponsor of the legislation, derived the statutory language from the Unemployment Compensation Act (UCA). *EEOC Brief* at 28-29 (citation omitted). EEOC reasons that, because the "payroll method" is consistent with the interpretation of the language used in the UCA, and because Section 2000e(b) was modeled on the UCA, Section 2000e(b) should be construed to receive the same "payroll method" interpretation. However, the UCA, now part of the Internal Revenue Code, at that time defined employer, in relevant part, as a person who, "on each of some 20 days during the calendar year, each day being in a different calendar week, employed at least [4] individuals in employment for some portion of the day." 26 U.S.C. § 3306 (modified in 1970 (continued...)

a well-reasoned analysis of *Congress'* intent in construing "employer" for the purpose of Title VII, EEOC's guideline instead offers only a justification for its own construction of that term. Because EEOC's guideline interpretation is flawed in the thoroughness evident in its consideration, this Court should give little persuasive weight to EEOC's guideline in construing the meaning of Section 2000e(b).

II

THE PROPER INTERPRETATION OF "EMPLOYER" UNDER TITLE VII

A. Rules of Statutory Construction Support a "Plain Language" Interpretation

> [T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). The Seventh Circuit concluded that its interpretation comports with the "plain language" of Section 2000e(b), in that it gives meaning to the phrase "for each working day" which is lacking in EEOC's

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[3] (...continued)
Amendment to reduce number of employees from 4 to 1). As is clearly evident, the language utilized in the UCA definition is widely divergent from that used in Title VII, demonstrating that, had Congress intended the EEOC to count all employees even if they showed up only once a week (clearly required in the UCA definition), Congress not only knew how to say so, it had considered the model and rejected it.

interpretation. *Metropolitan*, 60 F.3d at 1228. EEOC argues that no import should be assigned to the phrase "for each working day," or, alternatively, that the phrase presents an ambiguity which EEOC's interpretation amply clarifies. *EEOC Brief* at 22. As pointed out above, EEOC's guideline simply fails to assign any meaning to the phrase "for each working day," since its official interpretation would have no different meaning than that if the phrase were omitted. Indeed, EEOC explains that, despite the addition of the phrase "for each working day," the interpretation of the statute should have the *same meaning* as the similar provisions utilized during the phase-in periods when that phrase *was absent*. *EEOC Brief* at 23 n.15. This argument ignores the settled rule that "'[w]here Congress includes particular language in one section of a statute but omits it in another ... it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Keene Corp. v. United States*, 508 U.S.___, 113 S. Ct. 2035, 2040 (1993) (citation omitted).

The significance of disparate language is amply pointed out in *Young-Gerhard v. Sprinkle Masonry, Inc.*, 856 F. Supp. 300 (E.D. Va. 1994). In that case, an employer subject to Title VII disputed the measure of damages based on 42 U.S.C. § 1981a(b)(3). Section 1981a(b)(3) limits the sum of compensatory and punitive damages in the following fashion: "(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000." The employer, Sprinkle, argued that the *Zimmerman* interpretation should be utilized by the court in measuring damages. *Young-Gerhard*, 856 F. Supp. at 301-02. However, the court rejected the employer's argument that the jurisdiction and the punitive statutes should be interpreted alike. *Id.* at 302. Placing the two statutes side by side in a

comparison, the court pointed out the disparity marked by the absence of the phrase "for each working day" in Section 1981a. *Id.* at 301. Upon finding the *Zimmerman* interpretation of the jurisdictional statute was better than that put forward in *Thurber*, the court concluded that

> [t]his reflection, however, should give Sprinkle no comfort, because the words of Sec. 1981a(b)(3)(B) appear simple enough ....
>
> Congress did not include in Sec. 1981a, as it did in Sec. 2000e, the phrase "for each working day." The Court concludes that the difference expresses the Congressional intent that the number of employees working each day is not a factor in applying the damage limitations under Sec. 1981a.

Young-Gerhard, 856 F. Supp. at 302. Consequently, the court utilized the *payroll method* to count the number of employees for Section 1981a purposes--*in a statute which omitted the phrase "for each working day."*

It is a settled rule of statutory construction that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." J. Sutherland, *Statutory Construction*, § 46.06 (1992). *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). By arguing that Congress' language should be given an identical interpretation in two statutes, where in one Congress includes the phrase "for each working day" and in the other Congress uses identical language but for the omission of that phrase, *EEOC Brief* at 23 n.15, EEOC essentially argues that Congress either made a mistake by its inclusion, or simply did not mean anything by its inclusion. While courts are not barred from disregarding words in a statute, courts do so only where it is clear that literal

"application will result in applying the statute as a whole in a way completely contradictory to its main and paramount purpose." J. Sutherland, *Statutory Construction*, § 47.37 (citation omitted). This is not such a case. The phrase "for each working day" *must* be construed in such a way as to give it significance in the context of the statute.

B. "Each Working Day" Should Refer to Compensation or to Physical Presence

In construing Section 2000e(b), some import must be assigned to the phrase "for each working day" in order to comply with the statutory canon that courts must give effect to all of the words of a statute.

In that respect, the Seventh Circuit's opinion adheres to established principles of statutory construction. Although it makes a distinction between hourly and salaried employees that is not clear on the face of the statute, the distinction is reasonable: under a counting method which looks to each working day, part-time employees are bound to receive different treatment than full-time employees. In essence, the Seventh Circuit's interpretation places emphasis on how many employees are being compensated on each working day.

An alternate interpretation which also adheres to a "plain meaning" interpretation and which would abolish the status distinctions disfavored by EEOC would simply count the number of employees present on a given work day. It would simply require that, for each working day in a given week, at least fifteen employees must be present at work in order for that week to count toward the jurisdictional minimum. This interpretation would simplify the administration of the statute for both EEOC and employers by clarifying, conclusively, when an employer is covered by Title VII.

Both the *Zimmerman* approach and the "physical presence" approach are consistent with established principles of statutory construction.

III

CONGRESSIONAL POLICY FAVORS A BROAD EXEMPTION FOR SMALL BUSINESSES

The purpose behind the specific statute in question, the "employer" definition, is to provide an exemption. EEOC wishes to construe the exemption as narrowly as possible, despite the fact that the entire legislative history of the statute demonstrates that Congress modified the original language out of a concern that EEOC's jurisdictional coverage would reach *too far*. Congress defined "employer" specifically to limit Title VII coverage to businesses of a certain size. *EEOC Brief* at 31 n.22 (citation omitted).

When viewed in context, the broader policy implications of Congress' concerns about seasonal employers clearly militate in favor of an interpretation in which the jurisdictional element requires fifteen employees to be at work or compensated on every working day of a work week in order for that week to count toward the minimum. Senator Dirksen and other senators were critical of Section 2000e(b) and sought modification out of a belief that the original definition of "employer" was *too inclusive*, and that certain small businesses *should be exempt* from Title VII. *Id.* at 28 (citation omitted). As Senator Humphrey explained, the rationale behind the number limitation was that "when the number of an employer's employees gets 'above 25, they get into some reasonable degree of gross product in terms of income or output or salaries or goods or services. They also lose most of whatever intimate, personal character they might have had.'" *Id.* at 31 n.22 (citation omitted).

Congress clearly intended that the calculation of the number of employees was meant to reflect the more general concept of the size of a business.

While the number of employees is clearly the relevant inquiry for purposes of defining jurisdiction under Section 2000e(b), Senator Humphrey's remarks indicated that gross product and the inherently personal nature of business relationships within small organizations prompted the size limitation. In other words, the intent behind the exemption provision, as expressed by Congress' modification of the statutory language, had significance beyond the mere attempt to exclude agricultural and seasonal employers. It reflected a more general intent to exclude all small employers from federal interference in the conduct of their business affairs. Consequently, the question of whether an interpretation of the statute comports with the policy goals of the statute must be determined by looking at why Congress would adopt an overall policy of providing a small business exemption to Title VII coverage.

Congress has often created exceptions and exemptions for small businesses, as well as creating special preferences for small businesses. *See, for example*, 15 U.S.C. § 2508 (one of many small business contracting set asides, this one for electric vehicle research and development); 21 U.S.C. § 343 (small business exemption from requirements under federal Food, Drug and Cosmetic Act); 22 U.S.C. § 2352 (creation of Office of Small Business to assist small businesses in participating in foreign commerce); 26 U.S.C. § 44 (special income tax credit available to eligible small businesses for the creation of disabled access); 38 U.S.C. § 3742 (creation of program for veterans to receive small business loans). These various federal programs clearly demonstrate that it is entirely consistent with federal policy to make special accommodations for small businesses. In

enacting the Small Business Act, 15 U.S.C. § 631, *et seq.*, Congress expressed the policy for such accommodations thus:

> For the purpose of preserving and promoting a competitive free enterprise economic system, Congress hereby declares that it is the continuing policy and responsibility of the Federal Government to use all practical means and to take such actions as are necessary, consistent with its needs and obligations and other essential considerations of national policy, *to implement and coordinate all Federal department, agency and instrumentality policies, programs, and activities in order to: foster the economic interests of small businesses; insure a competitive economic climate conducive to the development, growth and expansion of small businesses; establish incentives to assure that adequate capital and other resources at competitive prices are available to small businesses; reduce the concentration of economic resources and expand competition; and provide an opportunity for entrepreneurship, inventiveness, and the creation and growth of small business.*

15 U.S.C. § 631a(a) (emphasis added).

One way in which small business interests can be fostered is by exempting them from certain federal regulations. Such exemptions are not based on the idea that small businesses ought not conduct themselves consistent with federal policies, such as discouraging discrimination. Rather, Congress appears to be conscious of the fact that the cost of compliance with federal regulations can stifle the ability of small enterprises to allocate their limited resources to items which will add value to a business rather than simply increase the overhead of being in business. Special

treatment for small businesses reflects the congressional policy choice that foregoing an increase in a federal bureaucracy's jurisdiction is worth "the economic well-being [and] security of this Nation." 15 U.S.C. § 631(a). Freeing small businesses from some of the regulatory burdens at the early stages of their growth allows breathing space for such companies to become financially stable before expansion. Once these enterprises expand, they will soon enough be subject to Title VII and other federal laws, but they will be better able to cope with such regulatory burdens after they have reached a certain minimum size.

There is no doubt that the "employer" definition was intended to reflect a balancing of considerations: Congress' interest in exempting small businesses from too high a regulatory burden, and its countervailing interest in eliminating workplace discrimination. It is this Court's job to construe exactly where Congress struck that balance in enacting Section 2000e(b). In order to insure that small business enterprises receive equitable treatment under Title VII, and thus fulfill Congress' intent in *exempting* small businesses from too much federal regulation of their employment policies, amici support a plain meaning interpretation of employer. Section 2000e(b) requires that fifteen or more employees attend work or be compensated for each working day of a week in order for that week to count toward the jurisdictional minimum, and it is only employers who qualify under this calculation who are subject to Title VII and the jurisdiction of EEOC.

CONCLUSION

In carefully fashioning a definition of employer in Title VII of the Civil Rights Act of 1964, Congress intended to free small businesses from the reach of the federal statute, and indicated an understanding that interference by the government in the affairs of small businesses was unjustified. Both the language and legislative history of the statute in question bear out this intent by excluding employers such as respondents from the statute's reach. While EEOC's intent in trying to promote the protections of Title VII may be admirable, its interpretation should nevertheless be rejected as an unjustified attempt to expand its own jurisdiction beyond the grant of power conferred upon that agency by Congress.

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